IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1268

HERBERT LEO PALM,

Petitioner,

v.

VETERANS ADMINISTRATION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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This is in reply to the Memorandum For The Respondents In Opposition.

1. Respondents falsely state that "the District Court dismissed the ACTION (Memo 2). Actually, said Court dismissed the COMPLAINT only. (Pet. 3,11,17,24,29; Pet.App. 1b).

2. Respondents admit that Petitioner's Fed. R. Civ. P. 60(b)(2) motion raised more than one point, but that the District Court's Opinion answered only one point. (Memo 2; Pet. 14-21; Pet. App. 1c).

3. Respondents reference to the exercise of due diligence in filing the Tort claim is contrary to the facts in the case and the usual discovery rules do not apply in this case due to the CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL interference. (Memo 2; entire petition and entire records 75 Civ 315 (CMM) and 75 Civ 748 (CMM) and Pet. 18-21 in particular.)

4. Petitioner personally has never contended that he was mentally incompetent due to a mental illness. The unauthorized statement to that effect of his former attorney, whom he dismissed due to his serious misconduct confirmed by the Association of the Bar of the City of New York, was not known to Petitioner until 22 days AFTER the District Court's dismissal of the complaint inspite of the due diligence exercised to obtain a copy there-

of at time of its filing and while the complaint was pending. (Pet. 11-13). The statement in Petitioner's Fed. R. Civ. P. 60(b)(2) Memorandum of Law prepared by someone else to the effect that his newly discovered evidence consisted, among other things, of two medical reports until then unknown to him showing mental illness, even if untrue, must be legally accepted as a "prima facie" showing of mental incapacity, was signed by Petitioner only because in the accompanying sworn Affidavit Petitioner stated:

> "8. I have never been informed by a competent medical authority of the fact that I suffered mental disorder until receipt of the documents heretobefore referred to as Exhibits "B" and "C" .
>
> 9. I strenuously contest the accuracy of the mental ailment diagnosis contained within the aforesaid medical reports and, without prejudice, deny that I am now or ever have been mentally ill. "

In his personally prepared appeal and petition, Petitioner made no claim of mental

incompetency at all. He merely furnished the required abridgement of the prior proceedings and a statement of the fact that he was illegally imprisoned for over 7 months in two mental hospitals and that the statute of limitations ran out during such illegal imprisonment (Pet. 8, 15-16). His real contentions are stated in "QUESTIONS PRESENTED" (Pet. 3-6) and "REASONS FOR GRANTING THE WRIT" (Pet. 24-29).

5. Petitioner never contended that he was under the continuing treatment of the same physician. He, in fact, submitted with the Appellant's Reply Brief a 4-page list of "Hospitals and Physicians who treated the insured (Petitioner) for total disability disease." (Pet. 18). It is known to the Respondents from Petitioner's letter dated August 2, 1974 to the Veterans Administration that the medical malpractices of the VA physicians in September and October, 1965 consisted mainly of REFUSAL of treatment and REFUSAL of hospitalization of the then fatally ill Petitioner to which he was entitled as a veteran, especially since he could not get the

proper treatment anywhere else in the United States. Consequently, Petitioner could NOT continue treatment with the same physician who REFUSED him such treatment in the first place. For this reason alone, and there are others besides, the authorities cited by Respondents on the "CONTINUOUS TREATMENT RULE" do not apply to this case. (Memo 2-3; Pet. 4, 16, 18, 21).

6. Petitioner's Mandamus Application was a COMPANION case directly related to this case and the Veterans Administration was a Defendant therein. It not only asked that the government investigate the criminal acts directed at Petitioner and to accord him consular protection, which means diplomatic representations to foreign governments in whose countries transgressions against United States citizens occur (22 U.S.C. § 1731, § 1732), but to also investigate and prosecute the criminal acts of certain members of the New York crime syndicate to which Petitioner became an involuntary witness (one murder, another possible murder, interstate wholesaling of narcotics, illegal gambling, prostitution and tax evasion operations, etc.), and to question him as

government witness subject to proper security arrangements by the Attorney General. The District Court granted the United States Attorney's Rule 12 Fed. R. Civ. P. motion based on gross abuse of his discretion not to investigate and prosecute without oral hearing and because of the constitutional "separation of powers" doctrine. (Pet.7-10); Pet.App. 1f-3f). The Opinion cited one other District Court and two Appeals Court decisions on one of which certiorari was denied. Petitioner did not appeal to the Court of Appeals because:

a) He had no attorney who was willing to appeal it and did not know then himself how to prepare an appeal;

b) He did not know then where in Europe he could check out the authorities cited and had no choice but to accept them at face value.

However, aside from bringing the case directly to the attention of the Federal Grand Jury and never receiving a reply (Pet.9-10), Petitioner, after receiving the District Court's order on September 17, 1975 only (Pet. 1f-3f), brought this case in detail (App.

with letter dated September 24, 1975 to the personal attention of then President Gerald Ford. Petitioner specifically requested President Ford:

" 1. To order the United States Attorney General to investigate and prosecute all violations of the Federal criminal statutes described in my Affidavit dated September 9, 1974, a copy of which is annexed hereto.

(The original Affidavit can be found in the Court's file. The complete file should also be available from the above cited Defendants and from the United States Attorney for the Southern District of New York. The case file contains many Exhibits.)

2. To order the United States Attorney General to turn this case over to a Federal Grand Jury or Special Federal Grand Jury, because racketeering and racketeer influenced and corrupt organizations are involved, and to order me to appear before such Federal Grand Jury or Special Federal Grand Jury after fool-proof security arrangements

are made for my person.

3. To order the United States Attorney General to make fool-proof security arrangements for my person as a government witness with particular emphasis on unadulterated water, unadulterated food and unadulterated medicines, as well as to provide me with proper legitimate medical care, if and when I should ask for same, all in the United States of America, so that I may be enabled to return to the United States as a government witness.

4. To order the United States Secretary of State to furnish me the proper consular protection to which I am entitled as a United States citizen while I remain outside the United States.

("Consular protection " means forceful diplomatic representations to the foreign governments in whose countries my civil rights and security of my person are violated, if I request such representations from the consular officials in the area, and not necessarily protective housing in a United States

Consulate,as District Judge Metzner interpreted it in his decision.) "

The same requests were already made in Petitioner's dismissed Mandamus complaint.

With letter dated October 29, 1975, the Counsel to President Ford, Mr. Philip W. Buchen, replied:

"Dear Mr. Palm: By this letter, I hereby acknowledge receipt of your letter dated September 24, 1975, concerning your"Petition for Writs of Mandamus" in the matter of Palm v. United States, et al.

By law, the Department of Justice is responsible for handling suits against the United States. Accordingly, I have referred this correspondence to the Office of the Attorney General for appropriate handling. Sincerely."

With registered air mail letter dated January 5, 1976, return receipt received, Petitioner advised Mr. Philip W. Buchen, Counsel to President Ford:

> "...I regret to advise you that up to this date I have heard nothing at all from the Office of the Attorney General. I would, therefore, greatly appreciate your checking into the status of this matter and your advising me as to when I may expect to hear from the Office of the Attorney General....."

Petitioner never received a reply to this inquiry nor an advice from the Office of the Attorney General on the action taken.

This proves that Petitioner had in the constitutionally most effective way promptly appealed the Mandamus dismissal order (Pet.App. 1f-3f) without getting the requested action from the then President and Attorney General of the United States.

7. The Fed. R. Evid. 201(b) did not prevent the trial judge from taking judicial notice of Petitioner's assertions concerning DURESS and other CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL acts in connection with the companion Mandamus suit (Memo 3). These assertions were no longer "subject to reasonable dispute" because Respon-

dents waived their right to establish the facts in regular Grand Jury and Court proceedings and instead chose to make a Rule 12 Fed. R. Civ. P. motion on the grounds of "DISCRETION" and "SEPARATION OF POWERS". By doing so, they admitted the facts contained in Petitioner's complaint and affidavit. (See 5A MOORE's Federal Practice 52.08 at 2735) (Pet. 24-28). Besides, Petitioner was and is willing to at any time testify in person, present his evidence and name the corroborating witnesses, subject to proper security arrangements for his person. The Mandamus suit was a COMPANION case in which Respondent Veterans Administration was one of the Defendants for the same acts underlying this Tort suit, and from it the trial judge was aware of the fact that Petitioner was by CIMINAL, UNLAWFUL and UNCONSTITUTIONAL means prevented from filing of his Tort claim until August 2, 1974. Besides, Petitioner's former attorney's statement as to "mental incapacity" (Pet. 10-12) amounted to an assertion of duress because the trial judge correctly found

Petitioner mentally competent inspite of his knowledge from the Mandamus companion suit of Petitioner's over 7 months illegal imprisonment in mental hospitals. Therefore, the assertion of duress was for all practical purposes made by Petitioner's former attorney. Had the trial judge held the requested oral hearing, this would, no doubt, have come out of it, and as a result his former attorney's Memorandum of Law or complaint would have been amended accordingly. Petitioner was not in a position to personally bring these circumstances to the trial judge's attention while the Tort complaint was still pending because, inspite of the exercise of due diligence, he did not receive his former Attorney's Memorandum of Law until 22 days after the complaint was dismissed (Pet. 12), and without knowing what his attorney had presented, it would have been inappropriate and hysterical for Petitioner to submit the circumstances directly to the District Court. He did so, however, promptly in his Notice of Appeal (Pet. 12-13). Petitioner had made transatlantic telephone calls to his former attorney regarding the non-receipt and con-

tents of his Memorandum of Law on July 22, August 7, 12, 18, 23, 25 and 26 (twice), 1975, and every time his former attorney claimed to have repeatedly airmailed duplicate sets of copies to him, the last one even "registered". He also claimed that he had presented the CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL circumstances to the District Court as per Petitioner's instructions. Since all of Petitioner's incoming mail and all identifiable outgoing mail, also to and from this Court, has all along been illegally opened by German postal employees with equipment of their intelligence services and its contents then disseminated to Petitioner's persecutors and other interested parties in various countries, and since some of his mail was in the past never delivered to him or on purpose delivered with great delay only, Petitioner was not in a position to promptly accuse his former attorney of any wrongdoing. After all, persons admitted to the bar are supposed to be responsible and of good moral character and obligated to adhere to certain professional ethics. Therefore, it is out of place to try to burden Petitioner with the misconduct

of his former attorney. Petitioner would certainly not have hesitated to submit the circumstance directly to the District Court if he had received the Memorandum of Law or had been able to obtain correct knowledge of its contents before the complaint was dismissed, and this is exactly what he did in his Notice of Appeal and what his attorney wanted to prevent.

In any event, the District Court had the discretion to take judicial notice of the Mandamus suit without being specifically requested to do so. (See 10 MOORE's Fed. Practice § 201.30 at II-38 and authorities cited therein; also Notes 11., 12., 42.(2,3,5), 43.(2) Fed. Rules of Evidence Annot. 201).

Furthermore, Petitioner presented the criminal, unlawful and unconstitutional circumstances of his case to the Appeals Court and requested it to take judicial notice of the Mandamus suit by reference to the original record available in the same courthouse and submitted to it the essential documents in the form of Exhibits.

Therefore, it was MANDATORY upon the Appeals Court to take judicial notice of it which it obviously refused to do. (See 10 MOORE's Fed. Practice § 201.40 at II-39 and § 201.60 at II-43 and authorities cited therein; also Notes 14. and 43.(1) Fed. Rules of Evidence Annot. 201). Respondents did not challenge Petitioner's request in the Appeals Court and, therefore, cannot now do so. (See 10 MOORE's Fed. Practice § 201.50 at II-40-42 and authorities cited therein.)

It should not be overlooked that it is Respondents' unwillingness to enforce the laws that forced Petitioner to live in involuntary exile and to flee the United States twice in order to save his life. Since it is Respondents who put him under total legal disability, it is out of place for them to try to hold omissions against him.

8. Petitioner herewith requests this Court to take judicial notice of the fact that on April 7, 1978, a murder attempt was made on him with exhaust gas from his deliberately tampered with automobile, and the needed oxygen and proper medical treatment were

denied him. In addition, the drinking water and food were mixed and sprayed with carbon oxide related chemicals and such chemicals were also infiltrated in his apartment with the result that Petitioner had to leave his apartment and travel in a state of near death through various European countries in an attempt to obtain unadulterated water and food and proper medical care. This carbon oxide poisoning has caused severe physical damages under which Petitioner continues to suffer and is expected to suffer for a long time to come. He returned to his apartment on May 3, 1978 only, and same is still being gassed to prevent recuperation. The facts can be proved by written evidence. It is clear that this murder attempt was made as a result of his having submitted this petition. Petitioner's claims of criminal interference with the assertion of his legal rights are, therefore, proved further. It is safe to say that, as before, certain officials of the United States Consulate General in Frankfurt am Main, Germany, knew in advance that such murder attempt would be made.

9. In light of the facts in this case and the legal situation, it is rather disappointing that Respondents, who are by law obligated to treat citizen litigants fairly and squarely, did not forthrightly admit that they have no valid defense in this case. Instead, apparently in an attempt to cover up their inactions against the largest and most powerful crime syndicate in the United States [1], they tried to distort the factual and legal circumstances of this case and dealt with the most important issues in footnotes.
It would seem that President Carter's call for morality in government and for protection of citizens' human rights made no impression on Respondents.

10. Kindly SEARCH THE RECORD of the Tort and Mandamus cases.

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[1] Crime syndicate means activities usually ascribed to the Mafia only.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, or, if procedurally possible, the case should be remanded to the District Court with instructions to give leave to amend the complaint.

Respectfully submitted,

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